Henry J. Kaiser Company *and* Charles E. Clendenin

Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO *and* Charles E. Clendenin. Cases 9-CA-14823 and 9-CB-4456

October 19, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 31, 1980, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, the General Counsel and Charging Party Charles E. Clendenin filed exceptions and supporting briefs; Henry J. Kaiser Company (herein also called Respondent Employer or Kaiser) and Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (herein also called Respondent Union), filed answering briefs; and Respondent Union filed cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge's finding that Respondent Union, *inter alia*, violated Section 8(b)(1)(A) of the Act by its unlawful failure to accept and/or process a grievance on behalf of its member Charles E. Clendenin.[2] However, we find that, in order to remedy that violation, the Administrative Law Judge should have included an order requiring Respondent Union to pursue Clendenin's grievance in good faith with due diligence and to make Clendenin whole for any loss of earnings he may have suffered as a result of Respondent Union's unlawful conduct.

The Administrative Law Judge found that it would be inappropriate to grant such a remedy here because the Company would most likely assert that Clendenin's grievance was now time barred and that Clendenin could not in any event demonstrate that his discharge was contrary to the collective-bargaining agreement. However, in devising an appropriate remedy for a union's unlawful refusal to process a grievance, the Board has not made a backpay award conditional on the merits of the grievance.[3] The fact that Clendenin's discharge may not have been unlawful, here, has nothing to do with the fact that Respondent Union violated the Act by failing to process Clendenin's grievance. As the Administrative Law Judge points out in his Decision:

> [M]erely because the Company took disciplinary action which does not violate the Act does not mean that an arbitrator might not have deemed the discipline unwarranted or too severe. An arbitrator is not bound by the same factual findings that I have made; he may do industrial justice and may effectuate a compromise of a grievance, whereas the Board may not.

It is uncertain whether the processing of Clendenin's grievance would have resulted in a milder form of discipline or any discipline at all. This uncertainty results from Respondent Union's unlawful action. Where, as here, such an uncertainty requires resolution, at least for the purposes of determining monetary responsibility, we deem it only proper to resolve the question in favor of the discriminatee and against the wrongdoer.[4] Since Respondent Union did not prove that had it processed Clendenin's grievance Clendenin still would have been terminated, we shall resolve the uncertainty in favor of Clendenin and find that Clendenin is entitled to at least some backpay. However, Respondent Union's backpay liability must be limited to any loss Clendenin suffered as a result of the refusal to consider and process his grievance. That grievance now appears to be time barred under the terms of the applicable collective-bargaining agreement, but

[1] Both the General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In the last paragraph in the section of his Decision entitled "The Union's Failure To Process the Grievance," the Administrative Law Judge inadvertently found that the "Union violated Section 8(a)(b)(1)(A) of the Act." This should read that the "Union violated Section 8(b)(1)(A) of the Act."

[2] The grievance concerned Clendenin's disciplinary discharge by Kaiser on or about January 28, 1980. Clendenin's discharge was also the subject of an 8(a)(3) charge which was consolidated with the instant charge, but was found to be without merit by the Administrative Law Judge herein.

[3] See *Local Union No. 2088, International Brotherhood of Electrical Workers, AFL-CIO (Federal Electric Corporation)*, 218 NLRB 396, 397 (1975).

[4] *Laborers International Union of North America, Local 324, AFL-CIO (Centex Homes of California Incorporated)*, 234 NLRB 367 (1978).

Respondent Union may be able to prevail upon Kaiser to waive those time limits. Accordingly, we shall order Respondent Union to make Clendenin whole for any loss of earnings he may have suffered as a result of his discharge by Henry J. Kaiser Company from the date of his discharge, January 28, 1980, until the earlier of the following occurs: Respondent Union secures consideration of his grievance by Kaiser and thereafter pursues it in good faith and with due diligence, or Clendenin is reinstated by Kaiser or obtains substantially equivalent employment.[5] *Centex Homes of California, supra*; *United Steelworkers of America, AFL-CIO (Inter-Royal Corp.)*, 223 NLRB 1184 (1976). Backpay shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent Employer, Henry J. Kaiser Company, Moscow, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, and that the Respondent Union, Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Cincinnati, Ohio, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraphs B,2,(a) and (b), and reletter the subsequent paragraphs accordingly:

"(a) Request Henry J. Kaiser Company to reinstate Charles E. Clendenin to his former position or, if it no longer exists, to a substantially equivalent position. If Henry J. Kaiser Company refuses to reinstate him, ask it to consider a grievance over his January 28, 1980, discharge, and thereafter pursue his grievance in good faith with all due diligence.

"(b) Make Charles E. Clendenin whole for any loss of earnings he may have suffered as a result of his discharge by Henry J. Kaiser Company from January 28, 1980, until such time as he is reinstated by Henry J. Kaiser Company or obtains other substantially equivalent employment or Respondent Union secures consideration of his grievance by Kaiser and thereafter pursues it will all due diligence, whichever is sooner, together with interest, to be computed in the manner set forth in the Board's Decision and Order."

2. Substitute the attached Appendix B for that of the Administrative Law Judge.

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT fail or refuse to fairly represent any employee we represent in the processing and filing of grievances.

WE WILL NOT coercively interrogate employees in preparation for defense of unfair labor practice proceedings without first obtaining voluntary participation by said employees and without first giving said employees assurances against reprisals if they choose not to participate in said interviews.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

WE WILL request Henry J. Kaiser Company to reinstate Charles E. Clendenin to his former position or, if it no longer exists, to a substantially equivalent position. If Henry J. Kaiser Company refuses to reinstate him, WE WILL ask it to consider a grievance over his January 28, 1980, discharge and thereafter pursue his grievance in good faith with all due diligence.

WE WILL make Charles E. Clendenin whole for any loss of earnings he may have suffered as a result of his discharge by Henry J. Kaiser Company from January 28, 1980, until such time as he is reinstated by Henry J. Kaiser Company or obtains other substantially equivalent employment or we secure consideration of his grievance by Kaiser and thereafter pursue

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[5] Counsel for the General Counsel further asserts that attorney's fees should be granted to Clendenin in order that he might be represented by his own attorney during any grievance arbitration proceeding. We find, however, that our modified Order herein provides adequate incentive for Respondent Union so that it will responsibly represent Clendenin's grievance.

If Respondent Union secures consideration of Clendenin's grievance by Kaiser, Member Fanning would terminate Respondent Union's backpay liability at that point unless Respondent Union fails to process the grievance in good faith and with due diligence.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Member Jenkins would award interest on backpay due based on the formula set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

it with all due diligence, whichever is sooner, together with interest.

JOURNEYMEN PIPE FITTERS LOCAL NO. 392, AFFILIATED WITH THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding was heard by me in Cincinnati, Ohio, on September 8–10, 1980. Based on two unfair labor practice charges filed by Charles E. Clendenin on January 28, 1980, two complaints issued, one on March 18, 1980, against Henry J. Kaiser Company, herein the Company, and the other on March 20, 1980, against Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, herein the Union, which complaints were consolidated by order of the Regional Director for Region 9 on March 20, 1980.

The consolidated complaints allege that the Company violated Section 8(a)(3) and (1) of the Act by terminating Clendenin on January 28, 1980, and that the Union violated Section 8(b)(1)(A) of the Act by declining to process Clendenin's grievance complaining of his termination. In addition, the complaint against the Company alleges that it assigned overtime to members of the Union on a preferential basis and that, when the attorneys for the Company and the Union were preparing for the instant proceeding, they interviewed prospective employee witnesses without giving the notice required by *Johnnie's Poultry Co. and John Bishop Poultry Co.*, 146 NLRB 770 (1964), enforcement denied 344 F.2d 617 (8th Cir. 1965). Both the Company and the Union denied that they violated the Act in any respect.

Upon due consideration of the entire record herein, including the demeanor of the witnesses and the briefs of the General Counsel, the Company, and the Union, I hereby render the following:

FINDINGS OF FACT

I. JURISDICTION

A. *The Company*

The Company, a Nevada corporation, is engaged in the construction industry as a general and a design contractor and has an office and place of business in Moscow, Ohio, where it is a contractor at the Wm. H. Zimmer Nuclear Power Station construction site.[1] During the 12 months preceding the issuance of the complaints herein, a representative period, the Company, in the course and conduct of its business operations, purchased and received products, goods, and materials valued in excess of $50,000 which were shipped to its Moscow, Ohio, construction site directly from points outside the State of Ohio. Accordingly, I find and conclude, as the Company admits, that it is and has been an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. *The Union*

I also find and conclude, as the Union admits, that it is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act. Both it and the Company, as a member of the National Constructors Association, are bound by the provisions of a collective-bargaining agreement covering the terms and conditions of the employment of the Company's employees.

II. THE DISCHARGE OF CLENDENIN

A. *Preliminary Facts*

Clendenin was terminated upon recommendation of his foreman, Tom Watson, on January 28, 1980, for being out of his work area and, the Company contends, for nonproductivity. That morning, Clendenin reported at the fifth floor of the reactor building for the regular 7:30 Monday morning safety meeting, a gathering of employees where a safety memorandum was distributed for reading and discussion by the employees. What transpired between 7:30 a.m. and an hour or so later, when Clendenin was discharged, is subject to dispute because the three principals, Watson, Clendenin, and his working partner, Alfred A. Thompson (Double A),[2] testified to three somewhat differing series of events.

What is not at issue is that after the safety meeting, which lasted approximately 15 minutes, employees were required to go to work; that Thompson, but not Clendenin, began to work after the meeting; that, at or about 8:10 a.m., Watson found Clendenin not at his worksite and directed him to go to work with Thompson; that Clendenin refused, saying that he had to use the toilet facilities; that Watson once again directed Clendenin to report to work; and that Clendenin again refused and left the worksite to go to a facility with flush toilets. As Clendenin was returning, Watson called to him to report to the Company's trailer-office, where Clendenin was terminated by General Foreman Oscar Willingham.

The General Counsel's attack upon Clendenin's discharge is two-pronged. First, the General Counsel claims the discharge was not for just cause because no employee had ever before been discharged for going to the bathroom. Second, the General Counsel claims that, even if there was merit to the discharge of Clendenin, the just cause was merely a pretext for Clendenin's protected and

[1] The power plant is being built for the Cincinnati Gas & Electric Company, herein the C G & E.

[2] Normally, a pipefitter (Clendenin) will work with a welder (Thompson).

concerted activities of openly criticizing what he thought was the Company's illegitimate practice of assigning overtime work to members of the Union, rather than to "travelers," members of other locals of the same International union (Clendenin is a member of Local 789, located in Tulsa, Oklahoma).

B. *Just Cause*

Clendenin testified that, when the safety meeting ended, he ascertained from Thompson that he would be working at the same site that he worked at the previous Friday.[3] He had also ascertained that, on the Saturday before, when he did not work, Watson had "changed hats" from a foreman to an employee and worked with Thompson, a job which Clendenin claimed as his own. In any event, Clendenin was notified by Thompson that he was going to obtain some tools from the toolshed, located outside the reactor building, and would meet Clendenin back at the worksite—a pipe chase located above the fourth floor of the reactor building reached by climbing a 30 foot scaffold from the fourth floor or descending onto the scaffold from a rear stairway on the fifth floor.

Clendenin then went to the toolbox, pulled out some grinders, and went to the worksite. There, he checked the equipment which had been left and found that Thompson had not yet arrived. Knowing that he could not get anything done by himself and needing to go to the bathroom, Clendenin descended from the scaffold to the fourth floor landing, returned to the fifth floor to get his coat, and came back to the fourth floor landing, where he waited to tell Thompson that he was going to the bathroom.

As he waited, along came Watson, whose view of Clendenin's activities up to that time was entirely different. According to Watson, Clendenin paid little attention to the safety meeting, conversing instead with other employees. When the meeting ended, and all of Watson's crew had dispersed, Clendenin continued his discussions, eventually sauntering over to Watson's desk to pick up and read the safety memorandum which the other employees had read 15 minutes before. Watson watched Clendenin until about 8 a.m., never mentioning to him to get to work. Then, Watson left the fifth floor, attended to other business, and returned to the fifth floor to check whether Clendenin had gone to work. Not seeing him there, Watson proceeded to the fourth floor, where he saw Clendenin talking with two other employees. It was then about 8:05 a.m.

In reviewing the testimonies of Watson and Clendenin, the conflict is clear; at least up to 8:05 a.m., Clendenin says that he was perform1ng his normal duties. If he had to use the toilet facilities, I am satisfied that the Company's practices allowed an employee to go to the bathroom (either a portable urinal, located on various floors of the reactor building, or a heated bathroom with flush toilets, located about a quarter mile from the reactor building), at any time, without a supervisor's permission, and only upon notifying his work partner of his whereabouts. On the other hand, if Watson's testimony was accurate, Clendenin was being wholly and inexcusably derelict by failing to perform any services.

Watson and Clendenin agree that, when Watson appeared at the fourth floor, Clendenin (who implied that he was alone) asked whether Watson was going to continue to work with Thompson as he had the prior Saturday. There may have been mention of whether Watson was wearing his foremen's hat or employee's hat. Clendenin also testified that Watson stated that, because he was a union member, he could do whatever he wanted. Watson denied saying this and I credit his denial. Both principals agree that Watson's answer was clear. Watson climbed up the scaffold to get to the pipe chase, saw Thompson working there alone, and directed Clendenin to go to work. Clendenin announced, according to him, that he was going to the bathroom; according to Watson, that he was going to "take a piss," the difference being that the former entailed a quarter-mile walk and the latter only a short distance away on the fourth floor. Watson again directed Clendenin to start working, and Clendenin walked away, proceeding in a direction opposite to the closest urinal, where Watson supposed that Clendenin was going. In fact, Clendenin proceeded to the flush toilets.

That ends the discussion of Clendenin's acts that morning, at least up to the time of his discharge. Watson's story, however, continues. After seeing Thompson working alone in the pipe chase and doing work which should have been done by two men, Watson, concerned about Thompson's safety, instructed him to stop working. Watson then left the pipe chase, went to attend to other duties, and (still thinking that Clendenin had gone to the urinal) returned to the chase some 5 minutes later to see whether Clendenin had returned. Again seeing Thompson alone, Watson again told him to stop working and that if another supervisor wandered by to inform the other supervisor that he was not working on Watson's directions. Watson also determined that he had had enough of Clendenin and went to the Company's trailer-office to recommend to Willingham that Clendenin be fired.

Finding the facts herein might have been made easy if only Thompson had corroborated the testimony of either Clendenin or Watson. Unfortunately, that was not the case. Located in the pipe chase, Thompson was able to see or hear little of what was going on outside the chase, on the scaffold, or below on the fourth floor landing, but what he heard amounted to a factual recitation partially at odds with both principal disputants. First, affirming Watson's testimony that he visited the pipe chase twice, Thompson testified that Watson, in his first visit, asked where Clendenin was. That obviously conflicts with Watson's testimony that he had seen Clendenin engaging in conversation with two other employees and had himself talked with Clendenin on his way up the scaffold. Thus, there would have been no reason for Watson to ask Thompson of Clendenin's whereabouts. Second, Thompson stated that Watson never told him to stop working, contradicting Watson's professed concern for

[3] Thompson testified that he spoke with Clendenin about this before the meeting started. However, Clendenin knew that Thompson had been asked to work the prior Friday.

Thompson's safety. Third, Thompson testified that, between the first and second visit by Watson, he heard Clendenin yell, "I'll be back, Double A." This contradicted Clendenin, who said that he yelled to Thompson before leaving to get his coat on the fifth floor and before Watson had arrived.[4] Fourth, Thompson told Clendenin at the safety meeting that all the necessary tools were at the worksite, other than those he was going to get from the toolshed. Clendenin's testimony conflicts with Thompson's: he stated that, after the meeting, he went to get the necessary tools from the toolbox—but only Thompson had a key—and went to check what tools were at the site, although Thompson had already told him that all the tools were there. Further, if Clendenin's testimony were truthful, that he arrived at the worksite 5 minutes after the meeting, he surely would have met Thompson, who arrived there at or about the same time and lifted the tools in buckets from the fourth floor to the chase and commenced working. Yet Clendenin testified that he saw the buckets (which should have already been lifted) and still insisted that Thompson was not present. I find that most improbable.[5]

Thompson was not otherwise favorable to Clendenin, depicting him as often engaged in talk, particularly with one other employee, at locations other than the worksite, thus delaying Thompson's completion of jobs. I found Thompson to be sincere and, of the three principal witnesses, the only one who had no reason to favor either party with his testimony. On the other hand, I am persuaded that some of his perceptions were simply inaccurate and, based on the probabilities, specifically discredit his testimony that Watson, at the time of his first visit, asked where Clendenin was, finding it more probable that Watson asked him whether Clendenin had worked up to that time, and discredit his testimony that Clendenin yelled that he would be back, finding that Clendenin's shout probably occurred, if it did at all, at the time of Watson's first visit, as Clendenin left for the toilet.

I am equally persuaded that Thompson would have no reason to misrepresent Clendenin's work habits. That Clendenin was loquacious was evident at the hearing, and even he admitted that he had been cautioned two or three times before his discharge about not doing his work quickly enough, which I attribute to his lack of attention to his work. Willingham had advised him previously that he ought to take more interest in his job; and Watson was always "jiving" him about his work. Finally, I note that on the day of his discharge, Clendenin, who is also an attorney, spoke not one word in his own defense in reply to at least the one charge he admitted knowing about—being out of his work area.

In sum, there is sufficient evidence on its face to support a conclusion that the Company had at least some independent basis for disciplining Clendenin. Thompson was at his job for 15–20 minutes before Watson's first visit; Clendenin was not, despite the ample time he had to join Thompson in the pipe chase. Instead, he searched for tools that he did not need, relied upon an excuse of going to the bathroom (after being at the job for about 40 minutes) to disobey a direction of his supervisor to commence working, and would not have been able to perform his first minute of work until more than an hour after the workday began.

C. *Pretext*

I am persuaded that Clendenin complained, at least earlier in his employment, about the fact that he was not given adequate overtime, and I conclude that he was engaged in protected activity. Clendenin's involvement with the issue of overtime commenced shortly after July 5, 1979, when he was reassigned to the "flush crew," a crew of employees under the supervision of Foreman Adam Kleinholz engaged in testing pipes and joints. Clendenin testified that he discovered that overtime work on the flush crew, which was composed primarily of members of the Union, was regularly assigned to union members (including those who did not work on the flush crews), rather than to travelers. Kleinholz, a member of the Union, maintained at his desk an overtime list which (according to Clendenin) contained the names only of union members who came to Kleinholz during the day to ask for overtime assignments. When Clendenin, a traveler, questioned Kleinholz on several occasions as to when he was going to have his own name placed on the overtime list, Kleinholz replied that Clendenin was only in the "triple A league" and that when he got into the "major league," his name would be put on the overtime list.[6] I agree with the General Counsel that the clear import of what Kleinholz was stating—Kleinholz did not testify—was that Clendenin or any other traveler would have to be a member of the Union before receiving preferential overtime assignments.

The record of overtime given to the flush crew does not fully sustain the General Counsel's position. Admittedly, although the composite exhibit purports to cover the period from July 16 through August 21, 1979, the day after Clendenin had been reassigned to the hanger crew, no time records were produced for 5 days in July

[4] I reject the General Counsel's contention that Thompson's testimony corroborates Clendenin's assertion that he was leaving for the bathroom. Clendenin testified that he yelled to Thompson only, "Hey, Double A" to check whether Thompson was already in the pipe chase. Further, in light of Clendenin's insistence that he was waiting for Thompson to arrive, it is improbable that he would indicate to someone who was not there that he was leaving. Finally, the substance of Clendenin's message was not necessarily that he was going to the bathroom. It could have meant solely that he was leaving the location to talk with the employees whom Watson saw Clendenin with a few minutes later.

[5] I note that it was possible, as Clendenin recognized, to approach the worksite from the fifth floor and along the scaffold, bypassing the fourth floor. In light of that fact, it is peculiar that Clendenin chose to wait for Thompson on the fourth floor, where he might miss him. Moreover, because of Thompson's testimony of his own whereabouts and his preparation for work, I conclude that Clendenin made little, if any, effort to go to work.

[6] The Company objected to this evidence in its brief on the basis that these conversations are not within the 6-month time limitation prescribed in Sec. 10(b) of the Act. It is well established that, although no findings of unfair labor practices may be based upon acts occurring more than 6 months prior to filing of an unfair labor practice charge, such facts may be used as background to establish motivation as well as to explain the alleged violations occurring within the 6-month period. *Local Lodge No. 1424, International Association of Machinists AFL-CIO; and International Association of Machinists, AFL-CIO [Bryan Manufacturing Co.] v. N.L.R.B.*, 362 U.S. 411, 416, fn. 6 (1960).

and a full 2 weeks in August.[7] The remaining records show that Clendenin worked overtime on 3 of 11 days that overtime was worked, demonstrating that discrimination against him was not complete. The exhibit, however, shows that many union members worked overtime on the flush crew, even though they did not work on that crew during regular hours. Union members worked overtime on 57 occasions, while travelers worked only 14 times, a far greater ratio than the number of times regular hours were worked by union members and travelers (48 versus 31, respectively). A number of union members whom Clendenin heard making requests of Kleinholz for overtime received overtime assignments.

It is true that all or many of the regular crew members may have declined to accept overtime, thus explaining why other employees worked. Some union crew members (for example, Andrews, Young, and Begley) worked even less overtime than did Clendenin. Two travelers, Gering and East, who were not members of the regular crew, worked more overtime than all but three union members, which included Foreman Kleinholz. However, it remains undenied that Clendenin frequently requested overtime from Kleinholz and was not given it, whereas others were. There is clearly a *prima facie* case of discrimination against him because of his status as a traveler; and the Company neither rebutted it nor explained it in any way. I conclude not only that the General Counsel's allegation was proved, *Motor City Electric Company*, 204 NLRB 460 (1973), enfd. as modified 512 F.2d 719 (5th Cir. 1975), but also that a necessary predicate for Clendenin's later actions was sufficiently established.

As stated above, on August 20, 1979, Clendenin was transferred to the hanger crew, which, unlike the flush crew, was composed almost entirely of travelers. His reputation as one who complained of lack of overtime apparently preceded him. Employee Charles Sears testified that on the same day he heard both Watson and Foreman James Robinson protest to Willingham that Clendenin should not be transferred to their own crews because he was a "troublemaker." Despite the denials of this conversation by both Willingham and Watson, I credit Sears, finding that he was genuinely sincere and unbiased and that, in this instance, his recall was precise and his testimony was probable. Although the General Counsel does not allege any separate violation, the circumstances of the transfer to the hanger crew were suspect, coming only a few days after Clendenin had not been given an overtime assignment that C G & E had wanted him and Marvin Ellison, his partner and another traveler, to work. Because of the Company's assignment of that work to union members, Clendenin complained, and his complaints resulted in two union members being taken off that job and Clendenin and his partner being given the overtime work on August 17, 1979. As a result, Clendenin did "make trouble," and Watson's and Robinson's comments were likely the result.

Clendenin worked on the hanger crew from August 20, 1979, until he was terminated. Apparently, the employees on that crew also had their difficulty with the assignment of overtime, but the problems that they encountered and raised were different from the alleged complete denial of overtime on the flush crews. Rather, the employees complained that they did not receive an equitable share of overtime when compared with other crews, such as the flush and pipe crews, which consisted primarily of union members, and that often, when they were asked to work overtime, they would be asked so late in the day that they found it difficult or impossible to accept. There is no question that these two grievances were raised (but not by Clendenin) at one and possibly two meetings conducted or attended by Willingham in late August or early September or November 1979.[8]

On his last day of employment, Clendenin asked Watson whether he had worked overtime with Thompson during the weekend and whether he was going to continue as an employee that Monday. The General Counsel contends that Clendenin's taunting—described by Watson as "smart aleck" and "arrogant"—was the direct motivation for Clendenin's discharge. Thus, the General Counsel contends that had not Clendenin griped about Watson's having worked overtime in Clendenin's place Watson would have permitted Clendenin to use the toilet, would not have ordered him to commence working, and would not have recommended his discharge. Rather, Watson merely seized upon Clendenin's failure to work to conceal his real motive; i.e., to get rid of a "troublemaker."

The theory that the reason for the discharge was merely a pretext is not wholly without support in the record. In addition to the "troublemaker" remarks, which Watson denied, Willingham conceded that at one time he counseled Clendenin about worrying so much about overtime that he would not work during the day. Further, there is some record support for the proposition that Watson should not be believed. I have noted a number of instances where I have not credited Watson, including his failure to request Thompson, whom he found alone on January 28, to stop working as a result of a possible safety hazard. That appeared to be a major reason for Watson's actions that morning and, by discrediting this testimony, his motivation is somewhat suspect.

Further, I am not entirely satisfied with the events of January 25, 1980, and the Company's explanation of why Clendenin was not offered overtime while Watson worked on Saturday in the position occupied by Clendenin the prior day. The testimony of Watson, in particular, was conflicting and inconsistent, and appeared to contradict that of Willingham. Watson shifted from a statement that he did not ask Clendenin to work (because

[7] The General Counsel does not contend that an adverse inference should be drawn from the absence of company records.

[8] The General Counsel contends that, at these two meetings, Willingham specifically stated that union members would receive overtime before travelers. I discredit such testimony, finding instead that Willingham merely referred to priority in assignments being given to foremen because a foreman was required to be on the job at all times. I note that there were not only union members who were foremen on the hanger crew, but also travelers. Moreover, the documentary evidence does not prove that preference was given to union members on the hanger crew. Rather, for the period from August 22, 1978, to November 16, 1979, only one union member (not a foreman) worked overtime twice. Thereafter, overtime was worked on 7 days by a substantial majority of travelers.

he was not at his worksite), to a statement that he did ask Clendenin, to a statement that he asked him even though he would not have been eligible for overtime because he was absent the prior Wednesday and Thursday. Willingham assumed that all employees had been asked, but wanted Watson to work, although he could not recall why, except that he believed that there might have been insufficient time to notify employees.

On the other hand, Clendenin was not wholly believable either. His dislike of the Company caused him to level a series of broadsides, contending that his lack of productivity could not have been a reason for his discharge because the Company was not concerned with it. Employees were encouraged, when there was no work to do, to hide themselves. Relative to seniority, Clendenin insisted that there was plantwide seniority for union members, but only crew seniority for travelers, despite the fact that the record does not really support this contention. When faced with the fact that, even on the flush crew, he was given overtime, Clendenin explained that it was due to his reputation as an attorney that certain engineers recommended him. But the reputation was meaningless in light of Clendenin's explanation that he was given only the "dirty" and "nasty" tasks that union members refused to do. When pressed for details, Clendenin refused to name the engineers for fear that the Union would have them terminated.

Based upon a review of the entire record, I find that the General Counsel has failed to prove by a preponderance of the evidence that Clendenin's discharge was motivated at all by his complaints. Indeed, Clendenin tended to exaggerate the extent of his complaints that he was discriminated against because he was a traveler. The record demonstrates that only one minimal complaint was made by him from the time that he was transferred to the hanger crew until the Monday on which he was discharged.[9] More importantly, there is little to show that Watson's recommendation that Clendenin be discharged was made because Clendenin had complained about Watson's having assumed his overtime. Rather, Watson went to Clendenin's worksite not because of Clendenin's complaint but because he observed that Clendenin was not working. His directive to Clendenin to commence working was merely a followup to the reason he went there in the first place—to ensure that Clendenin was performing work for the wages which the Company was expected to pay.

There is no dispute that by at least 8:30 a.m., according to Clendenin, he had not performed any work. According to other witnesses, the time of Clendenin's discharge was some 10 minutes or more later. In any event, the General Counsel contends that the Company originally discharged Clendenin solely for being out of his work area, arguing that no employee had ever before been dismissed for using the restroom facilities. Although I am persuaded that employees were free to use the facilities, as long as they notified their partners, and that Clendenin did not breach this rule *per se*, Clendenin clearly sought to use the rule to avoid work and, in that sense, since he was successful, the Company properly indicated that he was discharged for nonproductivity.[10]

I have assumed, *arguendo*, that Clendenin's activities were both protected and concerted. I conclude that there is a sufficient basis that his conduct was concerted. There were a number of employees who were disturbed about the distribution of overtime to the hanger crew and who believed that union members were taking advantage of their union membership to the detriment of the travelers. Although the General Counsel conceded that there was nothing inherently illegal about a foreman assumfng a journeyman's functions, as Watson did on January 26, it was Clendenin's suspicion that the taking away of his overtime was part of the same scheme of denial of overtime to travelers because they were not union members. Actually, in the circumstances, that might not be so; rather, Watson's working overtime could be equally due to his being a foreman. In any event, Clendenin's complaint was merely an extension of the same kind of complaint that other travelers had made; and I find that, because his complaint may have tended to redound to the benefit of all the travelers, it constituted protected concerted activity. *ARO, Inc.*, 227 NLRB 243 (1976), enforcement denied 596 F.2d 713 (6th Cir. 1979).[11]

I also find that Clendenin's implied adverse criticism of Watson was protected, since it constituted a complaint concerning working conditions, that is, Watson's assumption of an employee's overtime. But I find little in the manner in which Clendenin expressed his complaint to be protected. The initial questions he put to Watson were clearly within appropriate bounds. But, upon receiving Watson's answer that he had resumed his foreman's hat, and was not working as a journeyman, Clendenin had no right to protest Saturday's actions by refusing to work on Monday. By so holding, I reject Clendenin's claim that, at that moment, he had to use the bathroom and could not go to work. Rather, Clendenin admitted that despite his contention that he had diarrhea, a condition he suffered from the prior Wednesday and Thursday, his need to go to the bathroom was not that "imminent." Indeed, none of his actions indicated any crisis; on finding that Thompson was not at the worksite at Clendenin's first visit, Clendenin, despite having to attend to his bodily needs, returned to the fifth floor to get his jacket and then to the fourth floor to await Thompson's arrival. Considering that he had ample time all morning to take care of himself, that he was well

[9] Clendenin testified that after the meeting in late August or early September he told Willingham that something ought to be done about the overtime situation.

[10] The General Counsel also argues other facts testified to by Clendenin made his termination suspect—that Willingham, when he stated that he was going to terminate Clendenin, looked to Union Steward Walt Hamm, Jr., who nodded his approval; that Willingham filled in on the termination slip that Clendenin was discharged only for being out of his work area, and not for nonproductivity; and that there was no discussion by Watson of the reasons for the recommended discharge, other than his statement to Willingham that Clendenin was out of his work area. I credit none of Clendenin's testimony in these respects, noting that Clendenin's recollection was at this time imprecise, and that Clendenin admitted that events were moving too fast for him to recall.

[11] Clendenin earlier attempted to file a grievance with the union steward about his failure to receive equal overtime opportunities on the flush crew. The steward told him that if he did not like it he should "hit the road."

enough to return to work the prior Friday, and the otherwise untrustworthiness of his testimony, I conclude that pique, not physical illness, caused Clendenin's actions. His refusal to work and defiance of Watson's instructions to go to work was unprotected. As a result, I conclude that the Company's termination of Clendenin was not for reasons violative of Section 8(a)(3) and (1) of the Act.

D. *The Union's Failure To Process the Grievance*

When Clendenin had been told that his employment was terminated, Clendenin went to Union Steward Hamm for a grievance form because he wanted to file a grievance. Hamm asked Clendenin why he needed a grievance form, stating, "if you don't like it, hit the road."[12] Clendenin filed the unfair labor practice charge within a few hours of his conversation with Hamm. The General Counsel claims that Hamm's statement constituted a refusal to process a grievance, in violation of Section 8(b)(1)(A) of the Act. I agree. Clearly, Hamm, as the union steward and admittedly a representative of the Union, summarily rejected a request for representation, without investigation, peremptorily and perfunctorily. That Clendenin asked for a grievance form, rather than stated that he desired to file a grievance, if of no moment; Hamm, as hereinafter shown, knew exactly what Clendenin was asking of him.

The Union contends, however, that when its business manager, Robert Sullivan, was advised of Clendenin's discharge, he immediately investigated the discharge and, only after such investigation, determined that Clendenin's discharge was proper and that no further grievance procedures were warranted.[13] The proof demonstrates, however, that Sullivan was much more concerned with the unfair labor practice charge that Clendenin had filed than with the substance of Clendenin's grievance.

Sullivan was offended that any employee should immediately file an unfair labor practice charge against the Union rather than take up the matter with Sullivan personally. Indeed, the Union's brief takes the position that it was required for Clendenin to consult with Sullivan before filing the charge and that the charge is defective in that no refusal to process Clendenin's grievance was even ripe at the time of its filing. I find no factual or legal support for its position. The latter contention, in particular, is belied by Sullivan's testimony that Hamm immediately advised him on January 28 that Clendenin wanted to file a grievance.

As a result of his receipt of Clendenin's unfair labor practice charge, Sullivan went to the Company's jobsite on Friday, February 1, and spoke with Watson and Willingham about Clendenin's discharge. Seemingly convinced by their representations,[14] Sullivan wrote to Clendenin on February 4, 1980, requesting his position before coming to a final conclusion on the validity of his grievance. Clendenin then conferred with the Union's attorney, Harold G. Korbee, who agreed with Clendenin that he would not personally meet with Sullivan but would submit his position in writing. As a result, Clendenin forwarded a full statement of the facts by letter dated February 7, 1980. By letter dated February 13, 1980, David Jeffers, a union business agent, acknowledged receipt of Clendenin's letter and notified him that Sullivan was then out of town and would not be expected back until February 18, 1980, at which time he would have an opportunity to review Clendenin's letter. On February 27, 1980, Clendenin, not having heard from Sullivan and noting that in Sullivan's February 4 letter directed to the Company the Union had requested that the Company waive any timetable requirements imposed by the agreement's grievance procedure until February 25, 1980, asked Sullivan what had happened to his grievance. Clendenin also stated, as he had previously indicated to Korbee on February 6, 1980, that if there were any further inquiries regarding his discharge, someone should call him so that his grievance could be fairly presented.

On February 29, 1980, Sullivan at last replied, stating, in part, as follows:

> In connection with the investigation of your grievance, and our response to the charges you have filed with the Labor Board, we would appreciate receiving from you as soon as possible a statement of any facts upon which you base your claim that the Union has refused to "process a grievance filed by Charles Clendenin because he had made complaints concerning mistreatment of Union members on traveler's status and/or because he is a member on traveler's status."
>
> None of the officers of the Local Union have any knowledge or record of any such "complaints" that you have filed with the Union.
>
> As you must know, the Union is most interested in effectively representing employees who work under its bargaining agreement. However, the Union feels somewhat handicapped in this matter, since you appear to allege facts about which I have had no notice, record or information upon which to make any judgment.

On March 6, 1980, Clendenin acknowledged receipt of the above-quoted letter and again asked Sullivan whether a grievance had been filed on his behalf. He ended his letter with the following:

> Please tell me what the union steward and yourself decided to do regarding my grievance so I will know when I will be getting back to work at Kaiser, because there is no way a man could be discharged for going to the restroom and have it stick even if he is a Traveler. Please call me and we can set a time to prepare my case for the grievance hearing against Kaiser.

[12] Hamm did not testify.

[13] The Union, in its brief, contends for the very first time that this allegation should be dismissed because the collective-bargaining agreement provides as follows: "Layoffs and terminations shall be at the sole discretion of the Employer." Had this provision been relied upon by Hamm or Sullivan, the Union's argument might have been difficult to overcome. Since the Union did not rely on it, but was motivated by invidious reasons, I find a violation of the Act.

[14] Sullivan's letter to Clendenin, dated February 4, 1980, stated: "The information that they gave me seems to justify your discharge."

Sullivan's final letter to Clendenin was dated March 28, 1980, after the unfair labor practice complaint had been issued against the Union. Sullivan stated that it had been his experience as a business manager that employees who require or request the assistance of the Union in implementing the grievance procedure provided for in the applicable bargaining agreement generally come to the union hall and inform him or one of the business agents of their problem. Only then does the Union begin its investigation of the dispute and implement the applicable grievance procedure. Sullivan thought that Clendenin's situation was "probably the first one that I ever recall in which an employee filed charges with the NLRB before even coming to the Hall to request our assistance." Sullivan stated that on February 29 he wrote to Clendenin asking him for additional information which Clendenin did not supply. Based upon the investigation and information that the Union had, it was the Union's "opinion that [Clendenin's] discharge was justified and that there is insufficient evidence to warrant carrying the grievance to the second step which would involve bringing in the United Association International Representative."

The foregoing reveals that the Union had little interest in fairly representating Clendenin. Sullivan was upset at Clendenin's having filed an unfair labor practice charge against the Union and his attitude was thereafter tempered by the fact that such a charge had been filed. This is demonstrated by two facts: First, while Clendenin and Korbee had agreed that Clendenin would explain his position solely in writing, Sullivan ultimately held it against Clendenin for refusing to see him personally; second, instead of seeking additional information which may have been relevant to Clendenin's grievance, Sullivan tried to obtain Clendenin's position on his unfair labor practice charge before processing the grievance, and Sullivan's letter of March 28, 1980, demonstrated that he deemed the failure of Clendenin to supply the irrelevant information was determinative.

The result is that the Union gave Clendenin's case merely a minimal effort, perfunctory at best even if Sullivan is to be believed, and no effort at all if Sullivan is not to be credited. Although I have found that the Company did not violate Section 8(a)(3) and (1) of the Act by discharging Clendenin, I do not make that finding for the purpose of my discussion of the Union's liability herein. Rather, merely because the Company took disciplinary action which does not violate the Act does not mean that an arbitrator might not have deemed the discipline unwarranted or too severe. An arbitrator is not bound by the same factual findings that I have made; he may do industrial justice and may effectuate a compromise of a grievance, whereas the Board may not. In this case, the Union did little to help its unit's employee, solely because Clendenin filed an unfair labor practice charge against the Union. I find that the Union violated Section 8(a)(1) and (b)(1)(A) of the Act. *Penn Industries, Inc.*, 233 NLRB 928, 941-942 (1977).

E. *The Assignment of Overtime*

One of the General Counsel's complaints was the systematic denial of overtime assignments to Clendenin, whereas assignments were routinely given to members of the Union. I again note that Kleinholz did not testify. Because Clendenin's testimony in this respect is probable and not inherently inconceivable, I credit his testimony relating to Kleinholz' maintenance of an overtime list containing only the names of Local 392 members. From that fact, Clendenin's testimony about various individual union members asking for overtime work, and a document which shows that those individuals were given overtime work, I conclude that Clendenin was discriminated against during the course of his working on the flush crew in violation of Section 8(a)(3) and (1) of the Act.

When Clendenin was transferred to the hanger crew, the General Counsel admits that distribution of overtime to union members "was less significant." However, the General Counsel contends that Watson, on the Saturday before Clendenin was discharged, bumped into a journeyman's position, with another union member (a foreman of another hanger crew) being appointed as foreman, all to the detriment of Clendenin. On the other hand, it must be noted that overtime on the hanger crew was worked primarily by travelers. Indeed, Clendenin's name appears on the overtime list nine times,[15] and the General Counsel has failed to point out how Clendenin, after August 21, 1979, was treated any differently from other individuals who were members of the Union or were travelers employed on the hanger crew.

I am satisfied with the Company's explanation that denial of overtime to Clendenin and other travelers was not due to their lack of membership in the Union. C G & E assigned overtime. That it did so late in the day was not the fault of the Company, which made assignments only when C G & E authorized it to do so. There is no credible proof in this record to demonstrate that travelers were requested later in the day to work overtime in order to discriminate against them because they were not members of the Union. Nor do I find that the method of distributing overtime to employees was inherently destructive of employees' Section 7 rights. The method, instead, sought to protect the principle of equitable distribution of overtime within the crews and sought to give overtime to members of the crews who were working during regular hours on the projects which required overtime. That was not violative of the Act.

Finally, implicit in the complaints of the emoloyees, if not in the consolidated complaint herein and supporting brief, was that by the nature of the work being done other crews (populated by union members) were receiving overtime and the hanger crew was not. The record lacks any documentary proof of that fact. Although the travelers may have been correct, even to the extent that they were assigned to the hanger crew solely to deprive them of beneficial overtime, the proof is lacking. I dismiss this allegation of the complaint pertaining to the hanger crew.

[15] In addition, Clendenin refused offers of overtime on several occasions and was absent on days that overtime was worked.

F. *The Interview of Prospective Employee Witnesses*

On Friday, September 5, 1980, employees Earl Crawford and Charles Sears were summoned to the personnel office of the Company where they were interviewed by both Korbee and Bruce E. Allen, counsel of record for the Union and Company, respectively, in the presence of company and union officials. Both employees testified that they were not told that their attendance was voluntary nor that there would be no reprisals taken against them if they declined to participate or cooperate with the interviewers. Both testified that whatever assurances which were given to them were stated only after they both had declined to comply with Korbee's request for their versions of the facts concerning this proceeding and the testimony they were to give at the instant hearing. It was then that Allen stated to them that it was their prerogative not to answer and nothing would happen to them.

I credit the testimony of the two employees, noting that Billy Joe McGuffy, the Company's senior accountant, basically corroborated the employees' testimony, changing his recitation only after being led by the Company's counsel. In any event, Korbee conceded that at no time did he tell the employees prior to the interrogation that their participation in the interview was voluntary and that they did not have to be present before the interrogation began.[16] I, therefore, find a violation by the Company of Section 8(a)(1) and by the Union of Section 8(b)(1)(A) of the Act. In doing so, I reject the Union's claim that a violation of *Johnnie's Poultry Co., supra*, may be found only against an employer. *St. Louis Harbor Service Company*, 150 NLRB 636 (1964). This conclusion is not to be deemed merely a formalistic application of the *Johnnie's Poultry* rule. The coercive effect of the interrogation, without the necessary precautions required by law, was perfectly evident from the record. Even Respondents admit that the employees were scared. That they were later advised that their silence would not be held against them did not relieve the coerciveness of the initial part of the interview. A violation must be found and all of the Company's employees must be so advised by an appropriate notice.

III. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Company set forth in section II, above, occuring in connection with the operations of the Company herein, described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Company and the Union have violated the Act, I will recommend that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Because I have found that the Company has discriminated against Clendenin in the assignment of overtime because he was a traveler, I shall recommend that the Company be required to make him whole for any financial loss he may have sustained during the period from July 28, 1979, to August 19, 1979, that being the only period for which discrimination has been found within the applicable 10(b) period. Any backpay due hereunder shall be computed on the basis of the number of overtime opportunities lost during the above period, *Newport News Printing Pressmen's and Assistants' Union, Local No. 288, International Printing Pressmen and Assistants' Union of North America, AFL-CIO (The Daily Press, Inc.)*, 188 NLRB 475 (1971), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[17]

The finding that the Union violated its duty of fair representation would normally require that the Union proceed to arbitrate Clendenin's discharge or, if the Company refused to arbitrate, to make Clendenin whole for his loss of earnings. It is clear, however, that the time limits provided by the collective-bargining agreement's grievance machinery have long since expired. If the Union were ordered to proceed to arbitrate the dispute, the Company would most likely invoke the time limits and the provision which gives it the right to terminate employees for any reason. In these circumstances, because the agreement is clear, it would be inappropriate to grant the usual remedy of a make-whole order. That remedy would grant to Clendenin backpay which he had no right to receive, for he cannot demonstrate in any event that his discharge was contrary to the agreement. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570–571 (1976).

On the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following:

ORDER[18]

A. Respondent Henry J. Kaiser Company, Moscow, Ohio, its officers, agents, succcssors, and assigns, shall:

1. Cease and desist from:

(a) Discriminating against employees in overtime assignments because they are travelers or are not members of the Union.

[16] Crawford and Sears were brought to the interview by Union Steward Walter Hurd, who related to them en route words to the effect that as long as they told the truth, their jobs would not be affected. This did not constitute adequate warning that the employees' jobs were secure, because the assurance was linked to the employees' telling the truth. This is not to say that an employer must condone the telling of falsehoods; rather, the statement leaves the judgment to the Company or the Union, or both, of whether the employee is telling the truth, with unspecified discipline a distinct possibility. Further, there is inherent in Hurd's statement the possibility that employees may be coerced into giving misstatements in order to ensure the continuation of their employment—i.e., to tell their employer not what happened, but what the employer desires to hear.

[17] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objcctions thereto shall be deemed waived for all purposes.

(b) Coercively interrogating employees in preparation for defense of unfair labor practice proceedings without first obtaining voluntary participation by said employees and without first giving said employees assurances against reprisals if they choose not to participate in said interviews.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights which are guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is designed to effectuate the policies of the Act:

(a) Make Charles E. Clendenin whole for any loss of earnings or benefits suffered because of the unlawful denial of overtime work to him, to be computed as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records (including records of overtime worked) required to determine the amount of backpay due under the terms of this Order.

(c) Post at its premises in Moscow, Ohio, copies of the attached notice marked "Appendix A."[19] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Company's representative, shall be posted by the Company immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent Company has taken to comply herewith.

B. Respondent Journeymen Pipe Fitters Local No. 392, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing or refusing to fairly represent any employees represented by the Union in the processing and filing of grievances.

(b) Coercively interrogating employees in preparation for defense of unfair labor practice proceedings without first obtaining the voluntary participation by said employees and without first giving said employees assurances against reprisals if they choose not to participate in said interviews.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights which are guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its offices and meeting halls, including the Company's trailer-office where the union steward has a desk, copies of the attached notice marked "Appendix B."[20] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by the Union's representative, shall be posted by the Union immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees of the Company and members are customarily posted. Reasonable steps shall be taken by the Union to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent Union has taken to comply herewith.

IT IS FURTHER ORDERED that the complaints be dismissed insofar as they allege violations of the Act other than those found herein.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice reading "Posted by Order of the National Labor Relations Boards" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[20] See fn. 19, *supra*.